STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 6, 2024

Opinion No. 24-005

Constitutionality of Tennessee Legislation Providing for the Nullification of "Unconstitutional Federal Action"

Question

Is Senate Bill 1092 of the 113th Tennessee General Assembly, 1st Session (2023) constitutional?

Opinion

Senate Bill 1092 is constitutionally infirm. The separation-of-powers doctrine set forth in article II, sections 1 and 2 of the Tennessee Constitution prevents the General Assembly and the governor from nullifying "unconstitutional federal action." And the Supremacy Clause of the United States Constitution prohibits state legislation aimed at increasing the limited authority of state courts to nullify unconstitutional federal action.

ANALYSIS

As currently proposed, Senate Bill 1092 provides that "any federal action outside the enumerated powers set forth in the United States Constitution [is] in violation of the peace and safety of the people of this state, and therefore, said acts are declared void and must be resisted." SB1092, 113th Leg., 1st Sess. § 6. It further provides that "[t]he proper manner of resistance is a state action of nullification of the federal action." *Id.* § 7. It establishes a process for reviewing any "federal action" to determine whether the action is an "unconstitutional federal action." *Id.* § 5. It defines "federal action" broadly to include "federal law; a federal agency rule, policy, or standard; an executive order of the president of the United States; an order or decision of a federal court; and the making or enforcing of a treaty." *Id.* § 4(1). And it defines "unconstitutional federal action" as "a federal action enacted, adopted, or implemented without authority specifically delegated to the federal government by the people and the states through the United States Constitution." *Id.* § 4(2). The Bill then specifies various ways in which a state action of nullification may be initiated by the governor, the legislature, any Tennessee state court, a combination of counties and municipalities, or a group of registered Tennessee voters. *Id.* § 9. And once a federal action is nullified by state action under a process provided in Senate Bill 1092, the federal action is rendered "*ultra vires*, [and] will not be recognized as valid within the bounds of this state." *Id.* § 8(a)(2).

While the constitutionality of any bill ultimately depends on its specific terms, a bill that provides for the nullification of unconstitutional federal action in the way(s) that Senate Bill 1092 does would be infirm under both the Tennessee and the federal Constitutions.

1. The Tennessee Constitution creates three separate and distinct branches of government—"the Legislative, Executive, and Judicial"—and allocates "[t]he powers of the Government" among those three branches. Tenn. Const. art. II, § 1. The legislative branch makes the law; the executive branch administers and enforces the law; and the judicial branch interprets and applies the law. *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1975); *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975). In general, each branch may exercise only the powers that have been allocated to it. Tenn. Const. art. II, § 2. This constitutionally mandated separation of powers prevents one branch of government from exercising or encroaching on a power or function allocated to another branch. *See id.*; *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 843 (Tenn. 2008); *Richardson*, 913 S.W.2d at 453.

Significant here, the authority of the judicial branch to interpret and apply the law includes the power to determine the constitutionality of a law, "a function reserved for the judicial branch." *City of Memphis v. Shelby Cnty. Election Comm'n*, 146 S.W.3d 531, 536 (Tenn. 2004); *see also Richardson*, 913 S.W.2d at 454-55 (power to determine constitutionality of statute "rests with the judiciary"). Accordingly, legislative action, like Senate Bill 1092, that vests the governor—i.e., the executive branch—with the authority to nullify unconstitutional federal action is not permissible under Tennessee's separation-of-powers doctrine. *See City of Memphis*, 146 S.W.3d at 536-38 (finding that Election Commission did not have authority to refuse to place referendum ordinance on ballot based on belief that ordinance was substantively unconstitutional); *Richardson*, 913 S.W.2d at 453-55 (finding that legislative action vesting executive branch agency with authority to determine constitutionality of statutes was not permissible).

Similarly, legislative action that vests the legislature itself with the authority to nullify unconstitutional federal action is not permissible because it arrogates to itself the power to interpret the law that properly belongs to the judiciary. *City of Memphis*, 146 S.W.3d at 538; *Caudill v. Foley*, 21 S.W.3d 203, 209 (Tenn. Ct. App. 1999) (General Assembly cannot enact statute that effectively removes from the judiciary its authority to interpret and apply laws).

In short, under the Tennessee Constitution, the judicial branch alone has the power to determine the constitutionality of federal action. And even that authority is limited by federal law, as explained below.

2. Under our federal system, the States possess sovereignty concurrent with that of the federal government, subject to the limitations imposed by the Supremacy Clause of the United States Constitution. *Tafflin v Levitt*, 493 U.S. 455, 458 (1990); *see Pendleton v. Mills*, 73 S.W.3d 115, 126 (Tenn. Ct. App. 2001). State sovereignty is broader but federal sovereignty is superior: under the Supremacy Clause, the

> [United States] Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

State courts are presumed to have inherent authority to adjudicate claims arising under federal law, but only in the absence of "an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction." *Tafflin*, 493 U.S. at 458-59 and at 470 (Scalia, J., concurring); *see Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 221 (1916) (concurrent jurisdiction exists "unless excepted by express constitutional limitation or by valid legislation"). Thus, in those instances in which States have been ousted of their concurrent jurisdiction,[1] state courts are powerless to nullify unconstitutional federal action. *Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958); *see also Phelps v. Mutual Reserve Fund Life Ass'n*, 112 F. 453, 465 (6th Cir. 1901) (state courts cannot enjoin proceedings in the federal courts); *McNabb v. Tennessean Newspapers, Inc*., 55 Tenn. App. 380, 391, 400 S.W.2d 871, 876 (1965) (state courts are bound in questions involving the U.S. Constitution by decisions of the U.S. Supreme Court). Nor can the limited authority of state courts to nullify unconstitutional federal action be reclaimed or enhanced by state legislation in contravention of the Supremacy Clause. *See McCray v. United States*, 195 U.S. 27, 60 (1904); *Gibbons v. Ogden*, 22 U.S.1, 210-11 (1824); Andrew Jackson, Proclamation No. 26, Respecting the Nullifying Laws of South Carolina (Dec. 10, 1832), *reprinted in* 11 Stat. 773 (1859) ("[T]he power to annul a law of the United States, assumed by one State, [is] incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.").

Cooper v. Aaron is illustrative on these points. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the U.S. Supreme Court held that school segregation based on race violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and ordered States to desegregate their schools. In opposition to the ruling in *Brown*, Arkansas amended its Constitution to require the state legislature to resist—nullify—the Court's desegregation order. *Cooper*, 358 U.S. at 8-9. But in 1958, the U.S. Supreme Court held in *Cooper* that *Brown* was the supreme law of the land and that all States were therefore required to desegregate their public schools regardless of any state laws to the contrary. The *Cooper* analysis began with the basic principle, established in *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803), that the federal judiciary is supreme expositor of the law of the Constitution. *Id*. at 18. It follows, then, that the Supreme Court's interpretation of the Fourteenth Amendment in *Brown* is the supreme law of the land, and the Supremacy Clause makes that interpretation binding on the States, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id*. (quoting U.S. Const., Art. VI, cl. 2). The Court also pointed out that all state legislative, executive, and judicial officers are "solemnly committed by oath taken pursuant to Art. VI, cl. 3" to support the federal Constitution. *Id.* In light of these principles, *Cooper* held that even though the States have primary responsibility for public education, that responsibility, "like all other state activity, must be exercised consistently

[1] When States have not been ousted of their concurrent jurisdiction, a Tennessee state court could *plausibly* nullify an unconstitutional federal action, depending on the specific federal action at issue and all other relevant factors. *See, e.g., Roe v. Replogle*, 408 S.W.3d 759, 767 (Mo. 2013) (finding that Federal Sex Offender Registration and Notification Act did not improperly delegate authority to the Attorney General); *Bosh v. Fahey*, 53 N.Y.2d 896, 900, 423 N.E.2d 49, 51 (1981) (finding federal agency's directive inconsistent with federal statute); *Thomas v. North Carolina Dep't of Human Resources*, 478 S.E.2d 816, 824 (N.C. App. 1996), *aff'd*, 485 S.E.2d 295 (N.C. 1997) (finding invalidation of regulation promulgated by federal Department of Agriculture proper due to impermissible conflict with clear and unambiguous language of federal Food Stamp Act).

with federal constitutional requirements as they apply to state action." *Id.* at 19. That is, the law as determined by the Supreme Court is binding on, and cannot be nullified by, the States. *Id.* at 18-20.

In short, under this precedent, the Supremacy Clause prevents state legislation that would give state courts greater authority to determine the constitutionality of federal action than the limited authority they have under the Supremacy Clause. Senate Bill 1092 is therefore constitutionally infirm because it attempts to reclaim or increase the otherwise limited authority of state courts to nullify unconstitutional federal action.

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